

# Dispute Resolution Hotline

September 11, 2014

## A MISSED OPPORTUNITY – COURT DOES NOT CLARIFY WHETHER TWO INDIAN PARTIES CAN CHOOSE A FOREIGN SEAT FOR ARBITRATION

- In the instant case, assignment agreement has been entered into to effectuate maintenance agreement and not to substitute the same.
- Arbitration clause in an agreement does not perish on account of alteration in certain terms of the parent contract
- No clear court decision on whether two Indian Parties could choose a foreign seat

### INTRODUCTION

The High Court of Delhi (the “**Court**”) recently in *Delhi Airport Metro Express Pvt. Ltd. (“**Plaintiff**”) v. CAF India Pvt. Ltd (“**1<sup>st</sup> Defendant**”) & Construcciones Y Auxiliar De Ferrocarriles, SA (**2<sup>nd</sup> Defendant**)*.<sup>1</sup> was faced with the question with regard to the permissibility of two Indian parties to choose a foreign seated arbitration. The court did not opine on the question as it reached a conclusion that the impugned arbitration agreement was a tripartite agreement where **2<sup>nd</sup> Defendant** was a foreign party thereby dismissing the Plaintiff’s application.

### BACKGROUND

The Plaintiff (an Indian entity) in connection with the Delhi airport metro express line project had executed a Rolling Stock Supply Contract dated June 30, 2008 (“**Supply Contract**”) and a Maintenance Service Agreement dated June 20, 2008 (“**Maintenance Contract**”) with the **2<sup>nd</sup> Defendant** (a Spanish entity).

The Maintenance Contract provided for resolution of disputes through arbitration in London in accordance with the rules of International Chamber of Commerce, Paris. Subsequently, the **2<sup>nd</sup> Defendant** executed an Assignment Agreement dated May 17, 2010 (“**Assignment Agreement**”) with the **1<sup>st</sup> Defendant** (an Indian entity) in relation to the Maintenance Contract whereby the rights and obligations of the **2<sup>nd</sup> Defendant** were transferred to the **1<sup>st</sup> Defendant**.

Subsequently, due to certain disputes arising between the parties, the **1<sup>st</sup>** and **2<sup>nd</sup> Defendant** commenced arbitration as per the arbitration clause incorporated under the Maintenance Contract.

### PLAINTIFF’S CASE

The Plaintiff opposing the commencement of the arbitration proceedings filed an anti-arbitration suit before the Hon’ble High Court of Delhi on the principal basis that due to the assignment agreement, the Maintenance Contract stood novated. Thereby the arbitration agreement stood only between the **1<sup>st</sup> Defendant** and the Plaintiff.

Accordingly, as both **1<sup>st</sup> Defendant** and the Plaintiff were companies incorporated in India, they could not have chosen a foreign seat for the arbitration and thereby derogate from the Indian laws.

### DEFENDANT’S CASE

The Defendants *inter alia* contended that the arbitration agreement remained a tripartite agreement and **2<sup>nd</sup> Defendant**, a foreign party, continued to remain a party having obligations under the Maintenance Contract and that the Assignment Agreement was only a supplemental agreement.

### JUDGMENT

The Court thus considered that for the purpose of determination whether two Indian Parties could choose a foreign seat for arbitration, it first had to reach a conclusion that the **2<sup>nd</sup> Defendant** did not remain a party to the arbitration agreement and that the Maintenance Contract stood novated by the Assignment Agreement.

Accordingly, from a perusal of the provisions of the Maintenance Contract and the Assignment Agreement the Court took note of the following:

- The Maintenance Contract permitted the **2<sup>nd</sup> Defendant** to assign or sub-contract its obligations to a wholly owned subsidiary i.e. the **1<sup>st</sup> Defendant** without any consent of the Plaintiff;
- Recitals of the Assignment Agreement indicated that the Assignment Agreement was for the purpose of implementing the terms and conditions of the Maintenance Contract. The recitals provided that:

“During the negotiations held between CAF and the Project Company, prior to the execution of the Maintenance Agreement, both parties agreed on the convenience of having maintenance services out by a local subsidiary of

## Research Papers

### Horizon Technologies

January 21, 2025

### Compendium of Research Papers

January 11, 2025

### FAQs on Setting Up of Offices in India

December 13, 2024

## Research Articles

### INDIA 2025: The Emerging Powerhouse for Private Equity and M&A Deals

January 15, 2025

### Key changes to Model Concession Agreements in the Road Sector

January 03, 2025

### The Revolution Realized: Bitcoin's Triumph

December 05, 2024

## Audio

### Securities Market Regulator’s Continued Quest Against “Unfiltered” Financial Advice

December 18, 2024

### Digital Lending - Part 1 - What’s New with NBFC P2Ps

November 19, 2024

### Renewable Roadmap: Budget 2024 and Beyond - Part I

August 26, 2024

## NDA Connect

Connect with us at events, conferences and seminars.

## NDA Hotline

Click here to view Hotline archives.

## Video

### “Investment return is not enough” Nishith Desai with Nikunj Dalmia (ET Now) at FI18 event in Riyadh

October 31, 2024

### Analysing SEBI’s Consultation Paper

■ 2<sup>nd</sup> Defendant was not completely discharged from its obligations and liabilities towards the Plaintiff. Article 2.3 of the Assignment Agreement provided that:

*“However, notwithstanding the assignment of the Maintenance Agreement to CAF India, CAF shall continue to be responsible and liable to Project Company for the Maintenance Services under the Maintenance Agreement.”*

In light of the aforesaid findings, the court noted that the 2<sup>nd</sup> Defendant, a foreign party, continued to remain a party to the contractual arrangement and thus the arbitration agreement could not be said to be purely between two Indian entities. Further, with regard to Section 62 of the Indian Contract Act, 1872, the Court noted that the execution of the Assignment Agreement would not amount to novation of contract. The Court noted that even if some performance had been altered and assigned to the 1<sup>st</sup> Defendant, dispute resolution clause being a separable agreement would not perish on account of the alteration in certain terms.

Lastly, the court noted that the Assignment Agreement would have an effect of both the 1<sup>st</sup> and 2<sup>nd</sup> Defendant being co-promisors qua their obligations to be performed under the Maintenance Contract and the Assignment Agreement, which concept is also recognized under section 43 of the Indian Contract Act, 1872.

CONCLUSION

The Court thus concluded that the parties could continue with the arbitration proceedings pending before the arbitral tribunal at London.

ANALYSIS

The legal position on two Indian parties choosing a foreign seat remains untested under Indian Law. This case evidences that the defendant may always try to use this grey area in the law to his advantage and attempt to stall the entire arbitration process or at least delay it.

The Court in the present case approached the issue from the perspective of the persons who remained parties to the arbitration agreement and held that the arbitration continued to remain in the nature of an international commercial arbitration.

Another approach which could have been adopted was to determine if two Indian parties could choose a foreign seated arbitration. If the answer was in affirmative it would then make the determination of whether the 2<sup>nd</sup> Defendant continued to remain a party to the arbitration agreement moot. However, there has been much debate on the subject and with no clear answer. The approach adopted by court seems to suggest that a straight conclusion may not be possible and the answer could be in the negative.

Thus, to avoid obstacles during arbitration, it is advisable for two Indian parties to avoid choosing a foreign seat till there is some clarity on this issue from the courts.

– Ashish Kabra, Prateek Bagaria & Vyapak Desai  
You can direct your queries or comments to the authors

<sup>1</sup> I.A. No. 10776/2014 in CS(OS) 1678/2014

DISCLAIMER

The contents of this hotline should not be construed as legal opinion. View detailed disclaimer.

This Hotline provides general information existing at the time of preparation. The Hotline is intended as a news update and Nishith Desai Associates neither assumes nor accepts any responsibility for any loss arising to any person acting or refraining from acting as a result of any material contained in this Hotline. It is recommended that professional advice be taken based on the specific facts and circumstances. This Hotline does not substitute the need to refer to the original pronouncements.

This is not a Spam mail. You have received this mail because you have either requested for it or someone must have suggested your name. Since India has no anti-spamming law, we refer to the US directive, which states that a mail cannot be considered Spam if it contains the sender's contact information, which this mail does. In case this mail doesn't concern you, please unsubscribe from mailing list.

Scope of judicial interference and inquiry in an application for appointment of arbitrator under the (Indian) Arbitration and Conciliation Act, 1996